

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 19, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2182

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

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IN THE MATTER OF THE REFUSAL OF CARRIE L. DREW:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CARRIE L. DREW,

DEFENDANT-APPELLANT.

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APPEAL from an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed.*

DEININGER, J.<sup>1</sup> Carrie Drew appeals an order declaring her refusal to submit to a test of her blood-alcohol content to be in violation of § 343.305, STATS., and revoking her driving privileges for one year. Drew claims

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

the police lacked probable cause to arrest her for operating a motor vehicle while under the influence of an intoxicant (OMVWI) because the field sobriety tests administered were not sufficiently reliable. Drew argues, therefore, that she could not be found to have violated the implied consent law. We conclude that the record establishes probable cause for Drew's OMVWI arrest, and we therefore affirm the order.

### **BACKGROUND**

City of Platteville Police Officer Michelle Hechel was on foot patrol at approximately 1:51 a.m. on March 8, 1997, when her supervising officer radioed that "there was a vehicle facing the wrong way and potentially heading the wrong way on Mineral Street." After radioing Officer Hechel, the supervising officer observed the suspect vehicle drive the wrong way down Mineral Street and turn onto Second Street. The supervising officer then pursued the vehicle in his squad car. At this time, Officer Hechel radioed back that she had spotted the suspect vehicle traveling the wrong way on Mineral Street and that it had now turned onto Furnace Street. The supervising officer then intercepted the suspect vehicle and pulled it over.

The supervising officer approached the vehicle and "immediately upon making contact with the driver . . . detected a strong odor of intoxicants from the interior of the vehicle and also observed that the driver had extremely glassy eyes." After identifying the driver as Carrie Drew, the officer noticed Drew's speech to be "slightly slurred." The officer asked Drew whether she had been drinking that evening and she said no. After getting out of the car, Drew again denied having consumed any alcohol that evening, yet the officer continued to smell the odor of intoxicants coming from Drew's "facial area."

By this time, Officer Hechel arrived on the scene and verified that the vehicle pulled over was the one she had observed driving the wrong way on Mineral Street. After ascertaining that Drew had no physical disabilities and knew the alphabet, Officer Hechel asked Drew to perform field sobriety tests. Because Officer Hechel was still in her orientation period on the police force, the supervising officer observed the administration of the field sobriety tests.

During the balance test, Officer Hechel observed Drew “swaying from side to side as well and from back to forth.” Drew was next asked to recite the alphabet and during her first attempt was only able to reach the letter S. In her second attempt, Drew skipped from the letter J to the letter O and, after restarting, faltered again. Officer Hechel then asked Drew to do the finger-to-nose test which required that Drew “put the tip of her index finger to the tip of her nose.” Officer Hechel demonstrated how the test was to be performed, but Drew did not fully comply in that she brought the “pad of her index finger” to a point above the tip of her nose. Finally, Drew was asked to do the walk-and-turn test. After explaining and demonstrating this test, Officer Hechel observed Drew “stumble” twice while attempting to complete the test.

Officer Hechel then placed Drew under arrest for OMVWI. Drew was transported back to the Platteville Police Department, placed in a holding area and read the Informing the Accused form. Drew refused to submit to an Intoxilyzer test.<sup>2</sup> At the refusal hearing, Drew argued that there was no probable cause for her OMVWI arrest. Drew claimed that Officer Hechel failed to comply with the standardized sobriety testing requirements as established in the National

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<sup>2</sup> Drew stipulated in the trial court that her failure to provide a sufficient breath sample constituted a “physical refusal.”

Highway Transportation Safety Administration (NHTSA) manual. The trial court concluded that the officers had reasonable suspicion to stop Drew's vehicle, that the officers' observations of Drew gave them proper grounds to conduct field sobriety tests and that, after Drew's failures on those tests, probable cause existed to arrest Drew for OMVWI. The court then ordered Drew to undergo a mandatory alcohol assessment and revoked her driving privileges for twelve months.

### ANALYSIS

An officer may request a person to submit to chemical testing for blood-alcohol content upon his or her arrest for OMVWI. Section 343.305(2), STATS. Drew refused to consent to chemical testing after her arrest for OMVWI. Upon receiving notice of the State's intent to revoke her driver's license, she requested a refusal hearing under § 343.305(9). The only issues before the court at a refusal hearing are: "(1) whether the officer had probable cause to believe that the person was driving under the influence of alcohol [and lawfully placed the suspect under arrest]; (2) whether the officer complied with the informational provisions of § 343.305[(4)]; (3) whether the person refused to permit a blood, breath or urine test; and (4) whether the refusal to submit to the test was due to a physical inability unrelated to the person's use of alcohol." *State v. Willie*, 185 Wis.2d 673, 679, 518 N.W.2d 325, 327 (Ct. App. 1994). If at least one of the issues is determined in favor of the defendant, "the court shall order that no action be taken on the operating privilege on account of the person's refusal to take the test in question." Section 343.305(9)(d).

Drew argues that because her arrest was not supported by probable cause she properly refused to submit to chemical blood-alcohol testing. Whether the facts of record constitute probable cause is a question of law which we decide

de novo. *State v. Babbitt*, 188 Wis.2d 349, 356, 525 N.W.2d 102, 104 (Ct. App. 1994). In *Babbitt*, we set forth the following test for determining probable cause for arrest at a refusal hearing:

In determining whether probable cause exists, we must look to the totality of the circumstances to determine whether the “arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant.” Probable cause to arrest does not require “proof beyond a reasonable doubt or even that guilt is more likely than not.” It is sufficient that a reasonable officer would conclude, based upon the information in the officer’s possession, that the “defendant probably committed [the offense].”

*Id.* (alteration in original) (citations omitted). Furthermore, “[t]he State’s burden of persuasion at a refusal hearing is substantially less than at a suppression hearing.” *Wille*, 185 Wis.2d at 681, 518 N.W.2d at 328. In presenting evidence at a refusal hearing to establish probable cause, the State only needs to show that the officer’s account is plausible. *Id.* A court does not weigh evidence for and against probable cause or determine the credibility of the witnesses at a refusal hearing. *Id.*

Drew asserts that the trial court improperly considered the testimony regarding her performance on the field sobriety tests because the tests were not properly administered, and that, absent the tests, there was no probable cause for arrest. Drew claims that the arresting officer’s testimony shows that the walk-and-turn test was administered in a manner which makes it invalid according to the NHTSA manual, and that the balance, finger-to-nose and alphabet tests have been “rejected by the National Highway Traffic Safety Administration” since they are not listed as one of the standardized field sobriety tests in the NHTSA manual. Therefore, Drew contends that the trial court lacked both a factual and legal basis for its probable cause conclusion.

Drew's arguments suffer from a fatal flaw: there is absolutely no support in the record for her assertions. While Drew's counsel cross-examined Officer Hechel regarding her familiarity with the NHTSA manual and established that she had not followed all of the steps or evaluated all of the "clues" the manual describes for the walk-and-turn test, no portion of the manual itself was offered into evidence. Neither was any expert testimony or other evidence offered to show that the tests actually performed by Hechel were unreliable, as Drew asserts in her brief. This court will not consider assertions of fact that are not a part of the record. *Jenkins v. Sabourin*, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981).

Moreover, Drew's argument contains a gap in logic and it misconstrues the law in Wisconsin. Perhaps it is true that the NHTSA manual describes a three test battery that is claimed to be highly reliable in identifying persons whose blood-alcohol concentration are over .10 when the tests are administered in a standardized manner and assessed on the basis of standardized criteria. This does not necessarily mean, however, that other combinations of sobriety tests not described in the manual are not reliable as well in assessing whether a person's ability to operate a motor vehicle is impaired by alcohol consumption. The Platteville Police Department Policy for OMVWI enforcement, which *is* a part of this record, specifically lists the alphabet test, the finger-to-nose/balance test, and the walk-and-turn test as those which "shall be given to all suspected OMV[W]I drivers." We are unaware of any legal authority in Wisconsin for the proposition that the NHTSA described tests, and only those tests, may be relied upon by law enforcement officers in assessing probable cause to arrest for OMVWI, and Drew refers us to no statutes or case law to that effect. In fact, *State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148 (1991), which Drew

cites for the proposition that an officer must perform field sobriety tests before making an arrest for OMVWI, suggests otherwise, stating that “[a] field sobriety test could be as simple as a finger-to-nose or walk-a-straight-line test.” *Id.* at 454 n.6, 475 N.W.2d at 155.

Having reviewed the totality of the circumstances set forth in the record, we conclude that the facts known by the officers at the time of arrest would lead a reasonable police officer to believe that Drew was probably operating a motor vehicle while under the influence of an intoxicant. *Babbitt*, 188 Wis.2d at 356-57, 525 N.W.2d at 104. Drew was spotted driving the wrong way on a one way street at approximately 2:00 a.m., which is near the time that the bars close in Wisconsin. The officers observed that Drew’s eyes were “extremely glassy,” that she emitted a “strong odor of intoxicants” and that her speech was “slightly slurred.” Drew was unable to complete a recitation of the alphabet, and she swayed back and forth and stumbled during field sobriety tests. The officers’ account of the basis for Drew’s arrest is plausible, and it establishes probable cause for the officers’ reasonable belief that Drew was OMVWI.

## CONCLUSION

Drew has not established any basis in this record for us to disregard the evidence regarding her performance on the field sobriety tests administered at the time of her arrest. We conclude that the officers, on the basis of those tests and their other observations, had probable cause to arrest Drew for OMVWI. Accordingly, we affirm.

*By the Court.*—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

